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DEC 31

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

Nos. 585 and 586

IN THE MATTER OF THE AMERICAN BOND & MORTGAGE COMPANY, INCORPORATED, ALLEGED BANKRUPT.

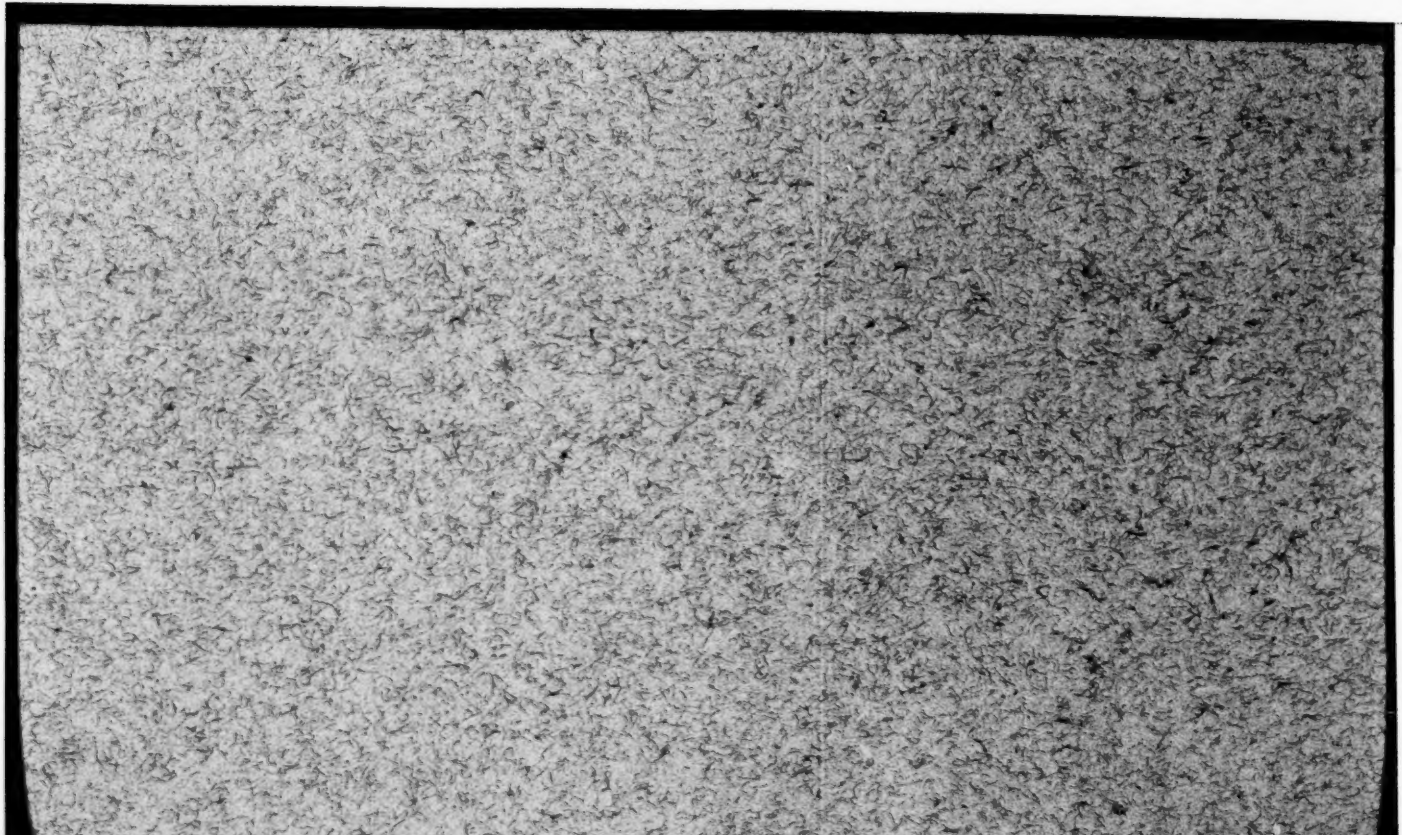
ROYAL INDEMNITY COMPANY, A NEW YORK CORPORATION, PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DeFRIEZ, BERTHA VERBY, FRANCES C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN AND NEWELL BECKER, PETITIONERS (APPELLANTS BELOW),

against

THE AMERICAN BOND & MORTGAGE COMPANY, INCORPORATED, RESPONDENT (APPELLEE BELOW).

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SELDEN BACON,
SAUL S. MYERS,
Counsel for Petitioners.



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against

THE AMERICAN BOND & MORTGAGE COMPANY, INCORPORATED, RESPONDENT (APPELLEE BELOW).

PETITION FOR CERTIORARI.

To Hon. Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Royal Indemnity Company, Parkes D. Wendell, Charles T. Trigg, Charles M. Winchester, Lloyd S. Cheney, William Lawrie, S. J. Bennett, Katie DeFriez, Bertha Verby, Frances C. Losee, Dr. M. A. Losee, J. L. Hone, Agnes E. Larkin, Ralph W. Eldredge, Jesse H. Owens, Daniel Larkin and Newen Becker, creditors of the American Bond & Mortgage Company above named, respectfully pray that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Seventh Circuit, entered in the above case on the 21st day of November, 1932.

Opinions Below.

The opinions of the District Court and of the Circuit Court of Appeals have not been reported as yet, but will be found in the record (R. 258 and 283).

Jurisdiction.

The decrees of the Circuit Court of Appeals were entered November 21, 1932. The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The questions presented are as follows:

1. Section 63 of Chapter 56 of the Revised Statutes of Maine (1930) reads as follows:

> "No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, *except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation.*"

The first question is whether, in view of that statute, a vote of the directors of this Maine corporation was sufficient in law to authorize the filing of a voluntary petition in bankruptcy in Illinois, where the corporation claims to have had its principal place of business for the greater portion of the six months next immediately preceding the filing of such voluntary petition in bankruptcy. Neither the District Court nor the Circuit Court of Appeals attempted to deny that such was the force of that act.

2. Both the District Court and the Circuit Court of Appeals held that creditors of the Maine corporation (who had themselves filed a petition for the involuntary bankruptcy of the corporation at the domicile of the corporation in Maine more than three months prior to the filing of the voluntary petition in

Illinois, and who had secured an adjudication in that involuntary proceeding in Maine) are not entitled to be heard to object to that voluntary petition on the ground that the directors of the corporation had, under that statute, no power to authorize such voluntary petition in bankruptcy.

The question is squarely presented of the correctness of that ruling.

3. Whether the principal place of business of a Maine corporation can still be said to remain in the Northern District of Illinois, within the meaning of the Bankruptcy Act, after (1) omnibus receivers have been appointed of all its property and assets, including its offices, records and books, in the Northern District of Illinois, (2) the receivers have gone into complete possession, (3) the corporation and its officers and directors have been enjoined, by the court appointing the receivers, from interfering in any way with its assets and property, (4) the corporation being concededly insolvent, and (5) the court in the equity suit having found that it was necessary for the protection and preservation of the rights of its creditors that the assets, property and business be preserved and administered as an entirety through receivers.

The equity receivers had been in full and undisturbed possession for the greater part of the six months next preceding the filing of the voluntary petition.

Statement.

The facts which are admitted on the face of the record may be summarized as follows:

On May 21, 1931, an omnibus bill in equity, by simple contract creditors, was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, against the American Bond & Mortgage Company (R. 35). The bill alleged that the American Bond & Mortgage Company was indebted to general creditors in a sum in excess of $8,000,000, part of which was overdue (R. 37). The bill further alleged that if the property and assets of the American Bond & Mortgage Company were sold or disposed of at forced sale, they might prove insufficient to provide for payment of the indebtedness in full (R. 39). The bill further alleged that unless the Equity Court, in view of the inability of the defendant to meet its maturing obligations, would deal with the property of the defendant as a trust fund, for the payment of its creditors as their several interests should appear, there would be great and irreparable damage to the creditors and to the defendant itself (R. 40).

The bill prayed that the Equity Court "administer" all and singular the property, rights and assets of the defendant, and, in order to preserve and protect the property and assets, and in order that they might be held together and ultimately sold or otherwise disposed of in the most advantageous manner, that the court appoint receivers of all the property of the American Bond & Mortgage Company, with full power and authority to take into their possession and hold such property and assets (R. 40, 41). The bill further prayed that the receivers continue to manage and operate as a whole the business then being conducted by the defendant, etc., etc. (R. 41, 42). The bill also

prayed for an injunction restraining the American Bond & Mortgage Company, and the owners, superintendents, managers, attorneys, agents and employees of that company from interfering with any of its properties, and "that at such time or times as may be found just and proper the properties and assets of the defendant may be ordered to be sold, in whole or in part, in such manner and upon such terms and conditions as this Honorable Court shall deem just and equitable, * * * and that the proceeds of any such sale be distributed among those entitled thereto as this Honorable Court shall adjudicate" (R. 44).

On the 22nd day of May, 1931, the defendant answered, expressly admitting all the allegations of the Bill and consenting to the relief prayed for therein. The cause was brought on to be heard on that day on Bill and Answer only, and the Court found "that it is necessary for the protection and preservation of the respective rights and equities of the complainants and of all other creditors of the defendant that the assets, property and business of the defendant be preserved and administered as an entirety through a Receiver to be appointed herein" (R. 48). The Court appointed the Chicago Title & Trust Company receiver (R. 48), and later on the same day, Arthur W. Draper, as co-receiver, of all the property of the American Bond & Mortgage Company (R. 52).

No process upon the Bill in Equity was issued to the defendant out of the District Court of the United States for the Northern District of Illinois, Eastern Division, or served upon it, and it appeared and so answered the bill voluntarily (R. 137, 239).

By the order appointing the receivers, they were authorized and empowered to continue the operation of the business of the defendant, with the usual powers of receivers in like cases, until the further order of the Court (R. 49, 52), and the defendant, its officers, superintendents, managers, agents and employees were enjoined from interfering with the transferring, selling or disposing of any property or assets or income of the defendant and from attempting to sell or in any manner dispose of any part of the property or assets of the defendant (R. 51).

The receivers immediately qualified and took possession of all the property of the American Bond & Mortgage Company in the Northern District of Illinois, including its offices and its books, records, files and papers (R. 239).

On the 25th day of May, 1931, your petitioners, as creditors of the American Bond & Mortgage Company, having claims amounting to many thousands of dollars in excess of all security held by them, filed a petition for the involuntary bankruptcy of the said American Bond & Mortgage Company in the District Court of the United States for the District of Maine, Southern Division (R. 57, 242). That was the district in which the said American Bond & Mortgage Company was and had been at all times for more than three years resident (R. 238). The petition alleged among other acts of bankruptcy, the appointment of the said receivers with the consent and procurement of the said American Bond & Mortgage Company (R. 84).

The American Bond & Mortgage Company filed an answer in the Maine bankruptcy proceeding, denying

its insolvency (R. 130). It withdrew that answer on September 3, 1931 (R. 131), and it was thereupon and on October 15, 1931, duly adjudged a bankrupt in Maine (R. 9) and the proceeding there was referred to the Referee in Bankruptcy.

Subsequent to the hearing in Illinois on the motion to dismiss the voluntary bankruptcy proceeding in Illinois hereinafter referred to, the first meeting of creditors was called by the Referee in Maine, and the first meeting held, but was adjourned to enable the Maine District Court to hear petitions for the transfer of the Maine bankruptcy proceeding to Illinois (58 F. (2d) 379).

Those petitions had been set down for hearing only after the District Court of the United States for the District of Maine, Southern Division, had entered the order of adjudication and had referred the proceeding to the Referee in Bankruptcy and the Referee had called a first meeting of creditors (58 F. (2d) 379).

In fact, the final petitions of the so-called "Debenture Committee" and the bankrupt for transfer were only filed after the expiration of the time within which creditors could file their proofs of debt in Maine and had actually filed such proofs of debt. And that so-called committee had itself filed a proof of debt with the Referee in Bankruptcy in Maine.

As one ground of objection to that motion it was urged that there was no valid pending bankruptcy proceeding in the Illinois District. The District Judge in Maine overruled all objections and directed transfer

of the entire proceeding to the Illinois District. On the questions here involved he said:

> "The same points made here were urged before Judge Barnes, noted in his opinion and decided. While not concluded by his action, I should certainly regard it as very persuasive and believe that, in the interest of orderly procedure and speedy ending of litigation, I should not decline to follow it unless I concluded that it was clearly wrong. At least, it is a precedent which I feel justified in following, and I do so."
>
> *In re American Bond & Mortgage Co.*, 58 F. (2d) 379.

The Circuit Court of Appeals for the First Circuit allowed an appeal from that order, which appeal is now pending in that Court awaiting argument. No meeting of creditors has ever been called in Illinois (R. 4).

On the 5th day of September, 1931, and more than three months after the said Equity Receivers had taken full and complete possession of all the assets and property of the said American Bond & Mortgage Company in the Northern District of Illinois (including the offices that had been occupied by it prior to said receivership, its books, files, records and papers), the Board of Directors of the said American Bond & Mortgage Company, on their own sole authority, and without any meeting or resolution of the stockholders of the American Bond & Mortgage Company authorizing such a step, caused to be filed in the said District Court of the United States for the Northern District of Illi-

nois, Eastern Division, a paper purporting to be a voluntary petition in bankruptcy of the American Bond & Mortgage Company. It appeared on the face of that petition that it had been filed by the sole authority of the Board of Directors of the American Bond & Mortgage Company (R. 1-3).

The said District Court of the United States for the Northern District of Illinois, Eastern Division, thereupon, without any prior notice to your petitioners, who were the petitioners in the said prior involuntary bankruptcy proceeding in the District of Maine, then pending, forthwith entered an adjudication of bankruptcy against the said American Bond & Mortgage Company on such alleged voluntary petition (R. 3, 17).

At the time of the adjudication in Illinois the Court had before it evidence in the equity suit of the prior filing of the petition in bankruptcy in Maine, but no notice was given to the creditors who had filed the petition in Maine (R. 193).

Thereupon, on the 10th day of September, 1931, your petitioner, the Royal Indemnity Company, applied for leave to file a petition to vacate the said adjudication on said pretended voluntary petition and to dismiss that petition as without jurisdiction on various grounds (R. 5). These grounds included (1) the claim that the American Bond & Mortgage Company had not had its principal place of business in the Northern District of Illinois during the greater part of the six months next preceding the filing of the alleged voluntary petition, owing to the appointment of said receivers of all its Illinois property and offices, more

than three months prior to the filing of the said involuntary petition (R. 13, 14, 15); (2) that the American Bond & Mortgage Company was organized and created under and by virtue of the laws of the State of Maine, by which laws only the stockholders in meeting assembled had authority to authorize the filing of a voluntary petition in bankruptcy, and no such meeting had been held or resolution passed by the stockholders authorizing such voluntary petition in bankruptcy (R. 15).

Leave was given to the Royal Indemnity Company (R. 7) to file such a petition by order of November 11, 1931, and thereafter, your other petitioners, on leave duly granted, joined in the petition of the Royal Indemnity Company to vacate and set aside the adjudication of the said voluntary petition and to dismiss the same (R. 248, 249).

Those petitions were subsequently answered by the American Bond & Mortgage Company, and the appointment of the receivers and their immediate qualifications, and taking possession of all the property in the Northern District of Illinois was expressly admitted (R. 239), as well as the facts that the American Bond & Mortgage Company was a Maine corporation and that the filing of the voluntary petition had not been authorized by any meeting of the stockholders of the American Bond & Mortgage Company, and that no such meeting of its stockholders had been held (R. 238, 239).

The Decisions of the Courts Below.

By permission of the Court the two questions of law involved as to whether, in view of the receivership, the

American Bond & Mortgage Company could be said to have had its principal place of business in the Northern District of Illinois, after the property had been taken possession of by the receivers, and the question whether the Court had the right to proceed to adjudication on a voluntary petition filed by no other authority than that of the Board of Directors, were taken up as matters of law. On those questions the District Court ruled: (a) *as to the effect of the receivership:*

> "An examination of the bill of complaint in the equity receivership case, the answer thereto, and the order appointing the receiver, leads the court to the conclusion that it was the intent of the parties to that proceeding and of the court that the business of American Bond and Mortgage Company was not to be destroyed, but, on the contrary, was to be conserved and preserved. Since this was the purpose of the parties and of the court in that proceeding, the court holds that American Bond and Mortgage Company did not, because of the appointment of an equity receiver on May 22, 1931, cease to do business on that day and, accordingly, did not, on that date, cease to have a place of business in the Northern District of Illinois."

and, (b) *as to the authority of the directors* of the American Bond & Mortgage Company to file a voluntary petition in bankruptcy without authority from the stockholders in meeting assembled, the District Court held:

> "It may be that the laws of Maine require the authorization of the stockholders in meeting as-

> sembled before a voluntary bankruptcy proceeding may be instituted by a Maine corporation, but if the board of directors of a Maine corporation authorize the filing of a voluntary bankruptcy proceeding, and such proceeding is filed in a court which otherwise has jurisdiction, it is exceedingly difficult to see what concern it is of a creditor whether that proceeding has been formally authorized by stockholders. As the court views the situation, a creditor is not at all concerned with this question, and this view has support in the authorities. *In Re Ann Arbor Mach. Corp.*, 274 Fed. 24; *In Re Wagy & Co.*, 22 Fed. (2d) 9. The court holds that this question cannot be raised by a creditor."

From the decrees entered upon that ruling, your petitioners appealed to the Circuit Court of Appeals for the Seventh Circuit, which, on November 21, 1932, filed its opinion affirming the said decision of the District Court saying:

> "The adjudication upon a voluntary petition is *ex parte*, and creditors are given no right to contest it. They are strangers at the bar and have no voice in the hearing, for the bankruptcy law permits no defense *in limine* to a voluntary petition. No defense is permitted by any party unless it be by stockholders contesting the asserted power of the directors."

On the point of the doing of business within the District, the Circuit Court of Appeals concluded by saying:

> "Remembering that it is clear that the intent of the court in the equity proceedings was not to destroy the business of the corporation,

> that that court was powerless to destroy or dissolve the corporation, that that court attempted in no way to interfere with the corporate identity or its powers or franchises except in the specific manner provided in the decree, that all such corporate powers not enjoined remained in the corporation, and that there is shown no change of locality for the transaction of such reserved corporate powers, however great or however little they may have been, it follows that the district court was justified in refusing to find that the principal place of business was not within the district during the greater part of the requisite statutory period."

The above are the rulings which it is now sought to review.

To avoid possible misapprehension of certain other facts which appear in the record, it may be mentioned (though those matters in no way entered into the decisions below), that at the same moment the Bill of Equity was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, there was also filed there an involuntary petition in bankruptcy against the American Bond & Mortgage Company and a petition for the appointment of a bankruptcy receiver in that proceeding (R. 14, 35, 136). These papers were on their face markedly defective and were, as was admitted in open court, filed to be "cooperative with" the Bill in Equity (R. 136, 139, 140, 141, 162). Answers to that petition were promptly filed in June, 1931, both by the bankrupt and by other creditors (R. 139, 206). No hearing was ever had on the petition for a bankruptcy receiver (R. 4, 6, 7, 8, 139).

And the issues presented by the answers have never been brought to trial (R. 139). Save for a refusal to dismiss that petition on motion, absolutely no subsequent step has ever been taken in that proceeding (R. 139).

The action of the District Court of the United States for the Northern District of Illinois, Eastern Division, on the equity side in subsequently appointing equity receivers and proceeding to administer the estate in equity seems to bring that dormant Illinois involuntary proceeding directly within the decision of this Court in *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, even aside from its collusive character, discussed with marked ability before this Court by the present Attorney General and Mr. William C. Bullitt, in the case of *United States* v. *Butterworth Corp.*, 269 U. S. 504, at pages 505-6.

This Court will, perhaps, observe that the answer of the American Bond & Mortgage Company to the petition to vacate contains no suggestion that the Equity Receivers or the District Court of the United States for the Northern District of Illinois, Eastern Division, have ever taken any steps to assert rights of the corporation against its former officers and controlling stockholders (R. 235). Over 200 creditors have expressed their particular desire that administration of the estate be conducted under the control of the District Court of the United States for the District of Maine, Southern Division, where adjudication has long ago been had (R. 9) and the first meeting of creditors held and adjourned by the court without their electing a

trustee. If there was no valid pending petition in Illinois, the administration must be in Maine.

The petitioners in the Illinois involuntary bankruptcy proceeding made no objection or any claim that the estate of the American Bond & Mortgage Company was already in *custodia legis* by virtue of the filing of the said involuntary petition in bankruptcy in Illinois; and they did not otherwise object to the creation of such equity receivership (R. 137).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred

1. In holding that creditors of the American Bond & Mortgage Company, although the petitioning creditors in the bankruptcy proceeding already pending in the District Court of the United States for the District of Maine, Southern Division, had no right to contest the adjudication of bankruptcy upon the alleged voluntary petition, on the ground that the said petition had not been authorized by the corporation in accordance with the laws of Maine under which it was created and existed.

2. In holding that the principal place of business of the American Bond & Mortgage Company continued to be in Illinois after the appointment of the Equity Receivers and their taking possession of the property and assets of the corporation.

3. In affirming the decision of the District Court of the United States for the Northern District of Illinois, Eastern Division, upon the petition to vacate the adjudication of bankruptcy on the voluntary petition.

Reasons for Granting the Writs.

The questions involved in this matter are questions of jurisdiction which have given rise to conflicting decisions in different circuits. These questions are important in jurisprudence, general in their application, and have been differently answered by various Federal courts and by the courts of various states.

Point I.

The Board of Directors had no power to authorize a voluntary petition in bankruptcy by the American Bond and Mortgage Company, and a petition filed solely by their authority is not the voluntary petition of the Corporation.

There was for a time an apparent sharp divergence between the decisions of different Courts of Bankruptcy as to the power of a Board of Directors of a corporation to authorize the filing of a voluntary petition in bankruptcy. It was soon observed, however, that the decisions in favor of such powers were as to corporations organized under the laws of States which did not expressly confine such powers to the stockholders. Where the corporate laws of a State provided that such power could be exercised only by the stockholders, it was held that action by the Board of Directors conferred no jurisdiction.

Some half dozen or more States have, or have had, such statutes, and where the statutes have been so construed the rulings have been uniform that only the

stockholders could authorize voluntary petitions in bankruptcy.

In re *Standard Shipyard Co.*, 262 Fed. 522 (D. C. Me.).

In re *Quartz Gold Mining Company*, 157 Fed. 243 (D. C. Ore.).

Van Emon v. *Veal*, 158 Fed. 1022 (C. C. A. 9th Cir.).

In re *Burbank Co.*, 168 Fed. 719 (D. C. N. H.).

In re *Crystal Ice Co.*, 283 Fed. 1007 (D. C. Mont.).

In re *Security, etc. Assn.*, 52 F. (2d) 961 (D. C. Nev.).

In re *Bates Machine Co.*, 91 Fed. 625 (D. C. Mass.).

It is now settled law that the question whether the Board of Directors of a corporation has the power to authorize the filing of a voluntary petition in bankruptcy is to be determined exclusively by the law of the State organizing the corporation. It determines by its own laws where the various corporate powers of its creature reside and what persons shall exercise them.

Home Powder Co. v. *Geis*, 204 Fed. 568.

In re *Russell Wheel Co.*, 222 Fed. 569, 573.

In re *Vassar Foundry Co.*, 293 Fed. 248.

In re *Standard Shipyard Co.*, 262 Fed. 522, 526.

Loveland on Bankruptcy (4th Ed.), Sec. 136.

Black on Bankruptcy (4th Edn.) p. 310.

Under the laws of Maine, even before the present prohibitory statute, the Board of Directors of a cor-

poration had no power to transfer its fundamental assets, but only to carry on its business.

Rollins v. *Clay*, 33 Me. 132.

The Maine corporation law was largely revised in 1891 and by that Act it was specifically provided:

> "No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation."
>
> Rev. Stat. Me. Cap. 56, Sec. 63.
> (For full text of section, see Appendix A.)

And this Maine statute was construed years ago by the District Court of the United States for the District of Maine as depriving the Directors of any power of filing a voluntary petition in bankruptcy on behalf of the corporation.

> In re *Standard Shipyard Company*, 262 Fed. 522, 526.

That such is the law of Maine has not been disputed either by the District Court or by the Circuit Court of Appeals in this case.

The question is the simple one whether, pursuant to Section 4 of the Bankruptcy Act, the American Bond & Mortgage Company has, in fact and in law,

filed "a petition to be adjudged a voluntary bankrupt." If unauthorized persons had filed such a petition in its name and ostensibly on its behalf, then such petition was not the act and petition of the corporation itself; the corporation had never declared its willingness and purpose to be "a voluntary bankrupt"; the conditions of Section 4 of the Bankruptcy Act had not been fulfilled; and the court was without jurisdiction.

POINT II.

The petitioning creditors were entitled to raise the objection.

Since the Maine law is clear that such power did not reside in the Board of Directors, it would seem that, totally irrespective of the capacity of the petitioners, the court of its own motion should have vacated the adjudication and dismissed the voluntary petition as unauthorized and as conferring no jurisdiction. But the courts below in this case have avoided this result, by holding that such action by the Board was not void, but only voidable, and that the invalidity could be taken advantage of solely by stockholders who alone could avoid the effect of the act of the Board.

The courts below have in this case held that even though the objection that the petition was not the act of the corporation ran to the jurisdiction of the Bankruptcy Court, these creditors (petitioners in the earlier petition in the Maine district) could not be heard to object, and the Court would not itself take the objection.

Decisions in the First and Second Circuits and in many State Courts have been the other way.

In the very recent case of *Commerce Trust Company* v. *Chandler*, 295 Fed. 241, the Circuit Court of Appeals for the First Circuit held that, under the provisions of the corresponding Massachusetts Act (see Appendix B) the objection could be raised not only by the stockholders but by anyone else in interest.

In discussing this Massachusetts statute, the First Circuit Court of Appeals said:

> "In the statute before us the Legislature was dealing with vital matters relating to the conduct and the life of corporations. We think it intended to prohibit a corporation, by its directors, or by less than two-thirds of its stock, at a lawful meeting, to change its corporate name, or the nature of its business, or the classes of its capital stock and their voting power, or to make any other lawful amendment or alteration in its agreement of association or articles of organization, or to sell, lease, or exchange all its property and assets, including its good will and its corporate franchise. We think the Legislature intended to place these fundamental changes in a corporation beyond the powers of directors and beyond the powers of stockholders representing less than two-thirds of its stock. The Legislature did not undertake to limit the protective powers of the statute, nor to say for whose protection it was made. We think it was clearly made for the benefit of stockholders; but we think it was not for their exclusive benefit. We think the Legislature intended to say that any person whose property rights were invaded by a noncompliance with the terms of this stat-

ute could assert the invalidity of any act attempted to be done without such compliance."
Commerce Trust Company v. *Chandler*, 295 Fed. 241, 243-244.

Under similar New York statutes forbidding the execution of corporate mortgages without the consent of the stockholders, it is held by the Second Circuit Court of Appeals, as well as by the New York Court of Appeals, that the objection can be raised by anyone.

In re Post & Davis Co., 219 Fed. 171.

In re James, Inc., 30 F. (2d) 555.

Leffert v. *Jackman*, 227 N. Y. 310.

Maryland Company v. *Schaefer Co.*, 141 Misc. 629, affd. without opinion 232 A. D. 766 and 256 N. Y. 663.

On the other hand, the Circuit Court of Appeals for the Seventh Circuit had previously held that, under the Illinois Railroad Law (for the details of which see Appendix C), the statutory requirement of consent of two-thirds of the stockholders, is for the protection of the stockholders only, and the stockholders alone may use it, following a decision of the Supreme Court of Illinois.

U. S. Mortgage & Trust Co. v. *Chicago & A. R. Co.*, 40 F. (2d) 386, 389.

In the Eighth Circuit Court of Appeals, there were dicta to like effect concerning the effect of the Colorado statute.

Westerlund v. *Black Bear Mining Co.*, 203 Fed. 599.

But as the suit there under consideration was brought by stockholders, the matter was merely dictum, and curiously enough, was, in part, predicated on District Court decisions in the Second Circuit long since overruled.

There is thus direct conflict between the Circuit Courts of Appeal in the First and Seventh Circuits as to this matter, with the First Circuit supported by rulings in the Second Circuit Court of Appeals and the Seventh Circuit supported by dicta in the Eighth Circuit Court of Appeals.

As Maine is within the First Circuit, some especial weight would seem to attach to the decision of the First Circuit Court of Appeals on the similar Massachusetts statute, and it is perhaps not unworthy of note that the Judge writing the opinion in the *Chandler* case in the First Circuit Court of Appeals (295 Fed. 241), from which we have quoted, is the same Judge who, sitting in the District Court of the United States for the District of Maine, had previously made the similiar ruling as to the force of the Maine statute in the *Standard Shipyard* case, 262 Fed. 522.

It seems peculiarly important that in case of such disagreement, where the Circuit Courts for the First and Second Circuits give the Eastern Statutes their full force and the court in the Seventh Circuit takes the other position, a decision overruling what has been accepted law in New England for almost a generation and recognized as such by the Federal Courts in New England, should emanate from this court, if at all, rather than from a Circuit Court of a Western Cir-

cuit, sitting in a State where a different conception of the corporation statutes obtains.

Moreover, the decision of the Supreme Court of Maine, in *Rollins* v. *Clay*, 33 Me. 132, that even prior to the statute the objection as to the limitation of the powers of directors could be taken by any person in interest, would seem to declare the policy of that State on the point, and, if so construed, that decision is controlling as to the construction to be placed on the Maine statute, though disregarded by the courts below.

Point III.

Upon the appointment and qualification of the equity receivers, and their taking possession of all of the property of the American Bond and Mortgage Company in the Northern District of Illinois, including its offices, books and papers, and the Corporation being itself enjoined from interfering with the property in any way, the Corporation ceased to have its principal place of business in the Northern District of Illinois.

Upon this point, too, there is seeming conflict between the decision below, on the one hand, and decisions in District Courts in other Circuits, and also rulings of this Court on the character of such receiverships.

In the following cases, receiverships of this character were squarely held to have put an end to foreign corporations having their principal place of business in the district of the receivership.

In re Perry Aldrich Co., 165 Fed. 249 (D. C. Mass.).

In re McNally Co., 208 Fed. 291 (D. C. S. D. N. Y.).

It had seemed to us that the Circuit Court of Appeals for the Seventh Circuit many years ago, in the case of *In re Plotke*, 104 Fed. 964, had strongly intimated that the conduct of business by an assignee in insolvency did not suffice to continue the principal place of business of the bankrupt as the place where the assignee resided when the bankrupt had removed from the State after the assignment. While the Circuit Court of Appeals in the present opinion has referred to that case as making no announcement in conflict with that former decision, it has failed to notice that feature of that case.

The industry of counsel has so far succeeded in disclosing but a single other case which is contrary to the ruling in the *Perry Aldrich* case and the *McNally Company* case. The case we refer to is *In re American & British Manufacturing Corporation* (300 Fed. 839), decided, in the District Court of the United States for the District of Connecticut, subsequent to the decisions in the *Perry Aldrich* case and the *McNally Company* case, which decisions were not even mentioned by the court in Connecticut.

In that Connecticut case, the question considered by the Court seems to have been rather one as to the character of the business than as to the locality of conducting it during the greater part of the six months next preceding the filing of the petition in bankruptcy. Both court and counsel in that case seem to have assumed that business done by the equity receiver was business done by the corporation. The decision of the case,

however, was in conflict with the direct rulings made in the *Aldrich* and *McNally* cases.

The cases cited by Judge Thomas in the *American & British* case to support his decision did not deal with the point here involved. On that subject of the applicability of the principal place of business clause to the conduct of business by general receivers, we have found no direct decisions except those mentioned.

Section 2(1) of the Bankruptcy Act does not refer to the principal place of *the business*, but to the place where "the persons bankrupt have *their*" principal place of business. In other words, the Bankruptcy Act refers to the place where *the bankrupt* is doing business, not to a place where a business it once owned is being done by someone else. (*In re McNally Co.*, 208 Fed. 291; *In re Perry Aldrich Co.*, 165 Fed. 249.)

The Bankruptcy Act does not create out of the business a sort of separate entity or existence, irrespective of the identity of the persons conducting the same. On the contrary, the thing emphasized by the statute is the identity of the person conducting the business. It is the place where the bankrupt himself has had *his* principal business.

When, therefore, the business passes out of his hands and it is taken over and conducted by others, he thereupon ceases to be in that business in that place, even though the business itself as such may go on. The relevant consideration is that the bankrupt himself has ceased to conduct the business and that, therefore, the locality has ceased to be the place where the bankrupt has *his* "principal place of business." Consequently, when the courts below undertook to decide

that the continuance of the business in the same locality is sufficient to give jurisdiction, they were improperly personifying the business and misreading the Bankruptcy Act.

The court below based its ruling in part also upon the assertion that "all such corporate powers not enjoined remained in the corporation, and that there is shown no change of locality for the transaction of such reserved corporate powers, however great or however little they may have been." But this clearly is not the meaning of the word "business" in Section 2(1) of the Bankruptcy Act. That word is obviously used in its common and usual meaning and refers to active and personal engagement in a commercial pursuit. The mere exercise of naked corporate powers, separate and apart from active management of the commercial enterprise which the corporation had in hand, is not the conduct of business within the meaning of that section.

We urge that certain decisions of this court clearly establish the true rule as to the nature and effect of such a receivership, from that adopted by the court below.

As to its nature, the decisions of this Court in *Price* v. *United States*, 269 U. S. 492, 502, and *United States* v. *Butterworth*, 269 U. S. 504, seem controlling.

As to the effect of such a receivership, we believe the decision in *United States* v. *Whitridge*, 231 U. S. 144, establishes that after this receivership *the corporation* no longer was doing business in the Northern District of Illinois.

The decision of the Sixth Circuit Court of Appeals in *Ohio* v. *Ferris,* 229 Fed. 892, seems to be to like effect.

The receivership in this case covered the greater part of the six months next preceding the filing of the voluntary petition. After the appointment of those receivers and their taking over possession of all the assets of the American Bond & Mortgage Company in the Northern District of Illinois, including its offices, its files and its records, it would seem that that corporation was "out of business" in the Northern District of Illinois.

While many authorities were cited below by opposing counsel as more or less remotely bearing on the question involved, we have not seen fit to trouble this Court with a discussion of those authorities in this petition. We believe the foregoing brief statement shows ample reason for granting the writs in the clear conflict between the Circuit Courts of Appeals for the First and Seventh Circuits.

On both questions there is radical divergence of decisions in different circuits, and the decision below is also believed to be in conflict with the decisions of this Court in the *Price, Butterworth* and *Whitridge* cases cited.

WHEREFORE your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Seventh Circuit commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, the full and complete transcripts of the records of all pro-

ceedings in the two cases, numbered and entitled on its docket, Nos. 4781 and 4782, in the matter of the American Bond & Mortgage Company, Incorporated, Bankrupt; and that the said decrees of the Circuit Court of Appeals for the Seventh Circuit may be reviewed and reversed by this Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just. And your petitioners will ever pray, etc.

ROYAL INDEMNITY COMPANY, PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DEFRIEZ, BERTHA VERBY, FRANCES C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN and NEWELL BECKER,

Petitioners.

By SAUL S. MYERS.

SELDEN BACON,
of New York;
SAUL S. MYERS,
of New York;
Of Counsel.

APPENDIX A.

Rev. Stat. Me. Cap. 56, Sec. 63.

Corporation not to sell franchises or entire property without consent of stockholders. R. S., c. 51, s. 60., 1929, c. 242. No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation. All such sales, leases and consolidations shall be subject to the provisions of this and the eleven following sections, and to the prior lien of stockholders as therein defined. Except as to franchises, this and the eleven following sections shall not be held to apply to mortgages or corporate property.

To effect a consolidation under the provisions of the foregoing paragraph and subject to the provisions of this and the eleven following sections, any two or more corporations organized or to be organized under the provisions of this chapter or existing under the laws of this state, or any corporation or corporations organized or to be organized under the provisions of this chapter or existing under the laws of this state and any corporation or corporations organized under the laws of any other state, may consolidate into a single corporation which may be either one of said corporations, provided the same be a corporation originally organized under the laws of this state, or a new corporation under the laws of this state to be formed by means of such consolidation, by entering into an agreement duly authorized by a majority of the direc-

tors of the respective corporations and signed by the duly authorized officers, and under the respective seals of said corporations, prescribing the terms and conditions of the consolidation, the mode of carrying the same into effect, whether or not the consolidated corporation shall be one of the constituent corporations or a new corporation created by such consolidation, and stating in such altered form as the circumstances of the case may require such other facts as are necessary to be set out in the certificate of organization of corporations organized under this chapter and as are pertinent in the case of a consolidation, the manner of converting the capital stock of each of such consolidating corporations into the stock or obligations of such consolidated corporation together with such other provisions and details as shall be deemed necessary to perfect the consolidation. Said agreement shall be acknowledged by one of the executing officers of each of the consolidating corporations before an officer authorized by the laws of this state to take acknowledgments of deeds, to be the respective act, deed and agreement of each of said corporations.

Subject to provisions of by-laws with reference to closing stock-books prior to stockholders' meetings, said consolidation agreement shall be submitted to the stockholders of record of each corporation at a meeting thereof called separately for the purpose of taking the same into consideration, and at said meeting a vote in person or by proxy shall be taken for the adoption or rejection of said agreement, and if the votes of stockholders of each corporation representing a majority of the voting power, on a proposal to consolidate said corporation with another, shall be for the adoption of said agreement, then that fact shall be certified on said agreement by the clerk or secretary of each corporation and the agreement so signed, acknowledged, adopted and certified, after it has been

examined by the attorney-general, and been by him certified to be properly drawn and signed and to be conformable to the constitution and laws of this state, shall be recorded in the registry of deeds in the county where the said consolidated corporation is located, and within sixty days after the day of the meeting at which said consolidation agreement is adopted by the stockholders, a copy thereof certified by such register shall be filed in the office of the secretary of state, who shall enter the date of filing thereon, and on the original agreement, certified as aforesaid, to be kept by the consolidated corporation, and shall record said copy. From the time of filing the copy of such agreement in the office of the secretary of state, said agreement shall be taken and deemed to be the agreement and act of consolidation of the said corporations and said original consolidation agreement or a certified copy thereof shall be evidence of the existence of such consolidated corporation and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation. When said agreement is so signed, acknowledged, adopted, recorded and filed, the separate existence of all of the constituent corporations, or all of such constituent corporations except the one into which such constituent corporations shall have been consolidated, shall cease, and the constituent corporations, whether consolidated into a new corporation or merged into one of such constituent corporations, as the case may be, shall become the consolidated corporation by the name provided in said agreement, possessing all the rights, privileges, powers, franchises and immunities as well of a public as of a private nature, and being subject to all the liabilities, restrictions and duties of each of such corporations so consolidated and all and singular the rights, privileges, powers, franchises and immunities of each of said corpora-

tions, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, and all other things in action of or belonging to each of said corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers, franchises and immunities, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this state, vested in any of such constituent corporations, shall not revert or be in any way impaired by reason thereof; provided, that all rights of creditors and all liens upon the property of any of said constituent corporations shall be preserved unimpaired, limited to the property affected by such liens at the time of the consolidation, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said consolidated corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

The notice herein provided for shall be given to all stockholders of record of all of the consolidating corporations, whether or not entitled to vote, but subject to any by-law provisions with reference to closing stockbooks prior to stockholders' meetings. If the holder of record of any share not entitled to vote in any constituent corporation selling, leasing, consolidating, or otherwise disposing of its property as aforesaid, shall at or prior to the taking of the vote, dissent therefrom in writing and shall at such time, or within one month from the date of such vote, file his written dissent therefrom with the president, clerk or treasurer of such corporation, then such non-voting shares of such stockholder shall be subject to and be entitled

to all of the rights granted by the eleven following sections in like manner as if they had been voting shares.

If the location of the consolidated corporation is not the same as that of the constituent corporations, then the clerk of the consolidated corporation shall within sixty days after such consolidation has become effective file a certificate of the consolidation, setting forth the names and locations of the consolidated and constituent corporations, in the registry of deeds of each county, other than that of the consolidated corporation, where the constituent corporations may be located.

The provisions of this section with reference to consolidation shall neither restrict nor enlarge the provisions of section one of chapter sixty-eight and section forty-four of chapter sixty-two as now amended.

APPENDIX B.

Mass. Bus. Corporation Law 1903.

Chap. 437, Sec. 40.

Section 40. Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize an increase or a reduction of its capital stock and determine the terms and manner of the disposition of such increased stock, may authorize a change of the location of its principal office or place of business in this commonwealth or a change of the par value of the shares of its capital stock, or may authorize proceedings for its dissolution under the provisions of section fifty-one.

It may, at a meeting duly called for the purpose, by the vote of two-thirds of all its stock, or, if two or

more classes of stock have been issued, of two-thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association so requires, change its corporate name, the nature of its business, the classes of its capital stock subsequently to be issued and their voting power, or make any other lawful amendment or alteration in its agreement of association or articles of organization, or sell, lease or exchange all its property and assets, including its good will and its corporate franchise, upon such terms and conditions as it deems expedient.

APPENDIX C.

Revised Statutes Illinois.

Ch. 114, Sec. 19.

"SEC. 19. Every corporation formed under this act shall, in addition to the powers hereinbefore conferred, have power:"

* * * * * * *

"Tenth—From time to time, to borrow such sums of money as may be necessary for completing, finishing, improving or operating any such railway, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by such corporation for the purposes aforesaid; but the concurrence of the holders of two-thirds in amount of the stock of such corporation, to be expressed in the manner and under all the conditions provided in the fifteenth section of this Act, shall be necessary to the validity of any such mortgage; and the order or resolution for such mortgage shall be recorded as provided in the second section of this Act; and the directors of such corporation shall be em-

powered, in pursuance to any such order or resolution, to confer on any holder of any bond for money so borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such corporation, at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation."

Provisions of the 15th Section referred to, which 15th Section dealt with the matter of increase of capital stock reads as follows:

"Such increase shall be sanctioned by a vote in person or by proxy, of two-thirds in amount of all the stock of such corporation, at a meeting of such stockholders called by the directors of the corporation for such purpose, by giving notice in writing to each stockholder, to be served personally or by depositing the same in a post office, directed to the post office address of each of said stockholders severally, with necessary postage for the transmittal of the same, prepaid, at least sixty days prior to the day appointed for such meeting, and by advertising the same in some newspaper published in each county through or into which the said road shall run or be intended to run (if any newspaper shall be published therein), at least sixty days prior to the day appointed for such meeting. Such notice shall state the time and place of meeting, the object thereof, and the amount to which it is proposed to increase such capital stock; and at such meeting the corporate stock of such corporation may be so increased, by a vote of two-thirds in amount of the corporate stock of such corporation, to an amount not exceeding the amount mentioned in the notices so given. Should the directors of any such corporation desire at any time to call a special meeting of the stockholders, for any other necessary purpose, the same may be done

in the manner in this section provided, and if such meeting be attended by the owners of two-thirds in amount of the stock, in person or by proxy, any other necessary business of such corporation may be then transacted, except the altering, amending or adding to the by-laws of such corporation: Provided, such business shall have been specified in the notices given.

REPLY

BRIEF

FILE COPY

FEB 16
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

Nos. 585, 586

ROYAL INDEMNITY COMPANY ET AL.,
PETITIONERS,

vs.

THE AMERICAN BOND AND MORTGAGE COMPANY, INC.

REPLY BRIEF OF PETITIONERS.

SELDEN BACON,
SAUL S. MYERS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

Nos. 585, 586

IN THE MATTER OF THE AMERICAN BOND AND MORTGAGE COMPANY, INCORPORATED, ALLEGED BANKRUPT.

ROYAL INDEMNITY COMPANY, A NEW YORK CORPORATION; PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DE FRIEZ, BERTHA VERBY, FRANCES C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN, AND NEWELL BECKER (APPELLANTS BELOW), PETITIONERS,

vs.

THE AMERICAN BOND AND MORTGAGE COMPANY, INCORPORATED (APPELLEE BELOW), RESPONDENT.

MEMORANDUM IN REPLY.

In reply to the contention of the respondent we desire to note briefly four matters.

A. The decision of the District Court for Maine in the case of the *American Bond & Mortgage Co.*, 58

F. (2d) 379, is under appeal by leave of the Circuit Court of Appeals for the First Circuit. That appeal was argued in the Circuit Court of Appeals and submitted on January 3rd, 1933, and is awaiting decision.

B. As to the statement on page 10 of respondent's brief that:

> "As far as the record in this case is concerned, this respondent at the time of the filing of the Equity proceedings (R. 35) and the appointment of Receivers, and at all times thereafter, was solvent and was a going concern (R. 38)."

We desire to point out that the equity bill was filed at 5 p. m. on Thursday, May 21st, 1931, but no process was issued or served. The respondent voluntarily appeared early in the morning of Friday, May 22nd, 1931, and admitted the allegations of the bill and joined in its prayers, and the receivers were appointed and qualified immediately that day. On Monday, May 25th, 1931, the first succeeding full business day, an involuntary petition in bankruptcy was filed against the respondent in Maine alleging as an act of bankruptcy that the respondent was insolvent when those receivers were appointed. That allegation the bankrupt admitted and it was adjudicated a bankrupt on that uncontroverted allegation (p. 9).

So far, therefore, as the record is concerned, as well as in fact, the respondent was insolvent when the bill was filed—and that is *res adjudicata* in the case.

C. The statement of Judge Peters, quoted on page 11 of respondent's brief, is in the opinion previously

cited which is now under appeal, having been argued and submitted in the First Circuit Court of Appeals on January 3rd, 1933.

D. As counsel for respondent have ventured to say at page 11 of this brief that "What petitioners really desire is to have the administration in Maine (where the Company had only a paper charter) and not in Illinois where it had its place of business" we may perhaps be permitted to give our version which is:

What petitioners really desire is to have the administration in Maine (where the jurisdiction has always been unquestionable) and not in Illinois where the bankrupt and the Illinois District Court are striving to bring it in order to keep on administering the estate in the equity suit by the equity receivers as it is still doing, *in spite of adjudication of bankruptcy over a year ago, pursuing the same course the same court pursued in the case of the Acme Harvester Co. twenty years ago, despite the rebuke given in that instance by this Court,* 222 U. S. 300.

The blocking of proceedings in bankruptcy by the Illinois District Court has been so complete that despite the pretended voluntary adjudication there in September, 1931, the first meeting of creditors there has never been called. And while the creditors met in the Maine proceeding the Maine district judge, out of a mistaken deference to the Illinois District Court, ordered the creditors to adjourn at once *before examining the bankrupt's officers and before electing a trustee.* Consequently it has been impossible to have an examination of the corporate directors either at

the first meeting or under Section 21*a* of the National Bankruptcy Act.

It is against an administration in the Illinois court which has been for a year and a half throttling all efforts to proceed in bankruptcy that the creditors have protested, and now seek the aid of this Court. And this situation, so far from showing that there is nothing of public importance involved, emphasizes distinctly that the matter presented is of public importance. Though not tried out because of the rulings of law complained of, the court will be able to get a very clear idea of this situation from the record.

Respectfully submitted,

SELDEN BACON,
SAUL S. MYERS,
Counsel for Petitioners.

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